PUBLIC PROSECUTOR

v.

ABDULLAH ISMAIL

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[CRIMINAL APPEAL NO. KG. 9 OF 1982]
18 SEPTEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Prima facie test - At the close of the prosecution case - Duty of Court to consider - If the Court were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt and not has the prosecution evidence established the case against the accused beyond a reasonable doubt.*

This was an appeal by the Public Prosecutor against the decision of the President, Sessions Court, Kuching on 27 February 1982 who at the close of the prosecution case acquitted and discharged the respondent on an offence of attempted rape on 27 May 1981 by applying the test that in order to constitute a *prima facie* case the prosecution must have adduced evidence, which at the close of the prosecution case, must satisfy the trial Court that the case against the accused had been proved beyond a reasonable doubt.

Held:

[1] The President of the Sessions Court had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not “Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "if the Court were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?”

[2] The complainant’s evidence was simple and straightforward. Her evidence cannot be said to be so inherently incredible as to be incapable of belief by a reasonable person, having regard to the evidence of the doctor. Besides the essential elements for a charge of attempted rape were not lacking and the accused was found in her bedroom wearing only an underpant at an unearthly hour.

[3] Applying the test expounded by Raja Azlan Shah (Ag. LP then) in the case of *A. Ragunathan v. Pendakwa Raya*, the Court ruled that a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged.

[4] The order of discharge and acquittal was set aside and the President of the Sessions Court, Kuching was ordered to call upon the accused to enter upon his defence.

[Appeal allowed.]

Cases referred to:
A. Ragunathan v. Pendakwa Raya [1982] CLJ (Rep) 63; [1982] 1 MLJ 139
Ong Kiang Kok v. PP [1970] 2 MLJ 283

Legislation referred to:
Criminal Procedure Code, s. 173(f)
Criminal Procedure Code (Amendment) Act 1976 [Sing], s. 188(1)

For the appellant - Nik Hashim b. Nik Abdul Rahman, S.F.C.
For the respondent - In Person

JUDGMENT

George Seah J:

This is an appeal by the Public Prosecutor against the decision of the President of the Sessions Court at Kuching dated 27 February 1982 discharging and acquitting the accused, Abdullah bin Ismail, at the close of the prosecution case.

Now, s. 173(f) of the Criminal Procedure Code reads:

> If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

In the case of *A. Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63; [1982] 1 MLJ 139 Raja Azlan Shah Ag. LP said at p. 141:

> The section is similar to s. 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976 which the Privy Council has recently given judicial interpretation in *Haw Tua Tau v. PP* [1981] 2 MLJ 49.

At p. 51 Lord Diplock said:

> The crucial words in s. 188(1) are the words "if unrebutted", which make the question that the Court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by s. 188(1) the Court must act on the presumption (a) that all such evidence of primary facts is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or defence until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

Then His Lordship proceeded to expound the approach to be adopted and at p. 52 His Lordship continued:

> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of facts are vested in a single Judge (or in 2 Judges trying capital cases). At the conclusion of the prosecution case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction" within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and Counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance.

Continuing Lord Diplock observed that

> their Lordships have dealt with its interpretation (s. 188(1)) at some length because in the Judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kok v. PP* [1970] 2 MLJ 283 there are certain passages that seem, upon a literal reading,

> to suggest that unless at the end of the prosecution case the evidence adduced has already satisfied the Judge beyond a reasonable doubt that the accused is guilty, the Judge must order his acquittal. But this can hardly have been what that Court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the Court refers, and it converts the hypothetical question of law which the Judge has to ask himself at that stage of the proceeding:
>
> If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact: "Has the prosecution evidence already done so?" For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of s. 188(1).

The Federal Court in the case of *A. Ragunathan v. Pendakwa Raya* (*supra*) adopts without dissent the construction given by the Privy Council to s. 188(1) of the Singapore CPC and applied it to s. 173(f) of our CPC.

In the first paragraph of his ruling the president of the Sessions Court said:

> At the close of the case of the prosecution, it is the duty of the Court to determine whether or not the evidence tendered by the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt. Before calling upon the accused to make his defence, the Court has only to be satisfied that the prosecution has made out a *prima facie* case against him.

In short, the President had applied the test that in order to constitute a *prima facie* case the prosecution must have adduced evidence which at the close of the prosecution case, must satisfy the trial Court that the case against the accused has been proved beyond a reasonable doubt. This test has been adopted in Sarawak after the Criminal Procedure Code (FMS Cap. 6) had been extended here with effect from 10 January 1976. Now the Privy Council has ruled that was the wrong test to be applied and the Federal Court had adopted the test expounded by the Privy Council in the case of *A. Ragunathan v. Pendakwa Raya* (*supra*). In the High Court I am bound by the ruling of the Federal Court.

Applying this test to the case under appeal I am constrained to hold that the President of the Sessions Court had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not "Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?"

Without going into details the salient points given by the complainant, Rabuyah binti Chie (PW6) are these:

(a) The accused is her brother-in-law. Both the accused and his wife live in the same house as the complainant, and her parents.

(b) On the night of 27 May 1981 the complainant went to bed wearing a long-pants and baju-kurong. Her panty was on. The accused entered her bedroom.

(c) She alleged that the accused pulled down her long-pants and panty. After pulling off his underpant the accused laid on top of her and tried to have sexual intercourse with her against her will. Accused placed a pillow on her mouth to prevent her from shouting. She struggled by using her legs to kick her bed. She felt that the accused's private part was about to enter her private part on a number of times.

(d) Because of the noise the father of the complainant went to investigate and found the accused in complainant's room wearing only an underpant.

(e) The complainant was subsequently examined by a doctor who found some bruises surrounding the lower part of her hymen. The doctor also found she has an extra globe below the clitoris thereby obstructing her vagina. Smears and swabs were taken and the doctor discovered spermotozoa present.

In a charge of attempted rape the essential ingredients which constitute the charge are:

(a) attempted sexual intercourse and

(b) without the consent of the complainant.

The complainant was about fifteen years of age at the time of the alleged offence and her testimony is simple and straightforward. Her evidence cannot be said to be so inherently incredible as to be incapable of belief by a reasonable person, having regard to the evidence of the doctor. Besides the essential elements are not lacking and the accused was found in her bedroom wearing only an underpant and at an unearthly hour. Applying the test expounded by Raja Azlan Shah Ag. LP using *A. Ragunathan* case I am constrained to rule that a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged. I therefore set aside the order of discharge and acquittal and order the President of the Sessions Court, Kuching to call upon the accused to enter upon his defence.

The appeal is therefore allowed.

Also found at [1983] 1 CLJ 101